BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRIAN K. BRECKENCAMP	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,064,790
WOODBRIDGE HOME EXTERIORS OF KS, INC.	)	
Respondent	)	
AND	)	
	)	
HARTFORD UNDERWRITERS INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the July 12, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Kelly W. Johnston, of Kechi, Kansas, appeared for the claimant. Timothy A. Emerson, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopts the same stipulations and has considered the same record as did the ALJ, consisting of the transcript of the June 14, 2013, Preliminary Hearing, with exhibits attached; and the June 24, 2013, Deposition of Justin M. Liogghio, with exhibits attached.

ISSUES

The ALJ found claimant's claim is founded entirely on his credibility, and that his credibility is lacking. The ALJ opined claimant failed to sustain his burden of proof that his motor vehicle accident of November 23, 2012, arose out of and in the course of his employment. The ALJ did not address the issue of whether the "inherent travel" exception to the "going and coming rule" applies, as the record before the court failed to establish

that claimant was on his way to perform his job duties for respondent at the time of the accident.

Claimant appeals arguing that he has upheld his burden of proving his accident more probably than not arose out of and in the course of his employment, and requests review of whether his accident and herniated disc occurring on November 23, 2012, arose out of and in the course of his employment with respondent; whether he sustained his burden of proof as to whether the motor vehicle accident on November 23, 2012, arose out of and in the course of his employment, based on the entire evidentiary record; whether the deposition testimony of Justin Liogghio was credible; and is the "inherent travel" exception to the "going and coming rule", as amended, still vital so as to determine this motor vehicle accident to be compensable. Claimant requests that temporary total disability benefits be awarded per stipulation from November 24, 2012 through January 15, 2013, and the authorization of payment of medical bills as itemized in the April 1, 2013, letter to the Director.

Respondent argues the Order should be affirmed.

The issues listed in claimant's request for review are:

1. Whether claimant's indisputable accident and herniated disc occurring on November 23, 2012, arose out of and in the course of his employment with respondent;

2. Whether claimant sustained his burden of proof as to whether the motor vehicle accident on November 23, 2012, arose out of and in the course of his employment, based on the entire evidentiary record;

3. Whether the deposition testimony of Justin Liogghio was credible; and

4. Is the "inherent travel" exception to the going and coming rule, as amended, still vital so as to determine this motor vehicle accident to be compensable?

FINDINGS OF FACT

Claimant began working for respondent in 2012, as a door-to-door solicitor for respondent's window and siding company. The company was described as "high end", indicating the quality and cost of the window and siding products. The products were expensive and not usually sold in lower priced neighborhoods. Claimant described the windows as costing over $1,000 per window. This caused respondent to be very selective in which neighborhoods it allowed its employees to sell. Claimant began as a sales person, but testified that Justin Liogghio, his supervisor, trained him as a route manager. Initially claimant was driven by Justin in a company car. Later, the members of the team would sometimes drive their own cars. Claimant did not drive as he did not have a driver's license.

Claimant was paid $10 per hour and reimbursed for meals and lodging if he stayed overnight in a town. Claimant regularly worked 6 hours per day with the hours running from 1 p.m. - 7 p.m. The "prime knock" time was from 3 p.m. to 7 p.m. Any variation in these hours of work had to be approved by Justin.

On the date of accident, claimant decided to begin working at noon, without receiving prior approval from Justin. This date was the day after Thanksgiving and claimant was apparently the only employee of respondent working that day. Claimant testified that he spoke to Justin on either Thanksgiving night or the next morning regarding his sales plans. Claimant testified he had his wife drive him to a prospective neighborhood and then he walked from house to house. On the date of the accident, claimant had his wife drop him in South Salina, Kansas to canvass a neighborhood. He could not remember the location of the neighborhood other than it was a few blocks south of an electronics store where his stepson worked. Claimant's wife testified the neighborhood was north of the electronics store. At about 1 p.m., claimant's wife received a text advising that claimant wanted to go to another neighborhood. She picked him up at about the same location as where she dropped him off. Again, she described the location as north of the electronics store. Claimant testified that his stepson was with his wife and they took him to the electronics store were the stepson worked, dropped his stepson off and were proceeding to the next neighborhood when the accident occurred. However, claimant's wife testified that she was alone when she picked claimant up.

It was shortly after claimant was picked up that the accident occurred, as they were traveling to the north side of town in order for claimant to work a different neighborhood. Claimant was unable to identify any street where he attempted to sell that day. He also was unable to recall if he had actually talked to any home owner that day.

Justin Liogghio, who testified by deposition on June 24, 2013, acknowledged claimant was to work on November 23, 2012. However, the normal work hours were 1 p.m. to 6 p.m. A Memorandum dated October 30, 2012, from Chad Connoy, Justin's supervisor, identified the Thanksgiving work hours as from 1 p.m. to 6 p.m. Any variations in the hours would result in claimant starting work at 3 p.m. and working until 7 p.m. Justin testified claimant was aware of the hours of work. Justin disagreed with claimant's statement that claimant could vary his working hours so long as claimant worked six hours per day. When questioned about a route manager position, Justin denied such a position even existed with respondent.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable

> to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(f)(1)(2) states:

> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:
> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
> (B) An injury by accident shall be deemed to arise out of employment only if:
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

Claimant contends the accident in question occurred while he was traveling from neighborhood to neighborhood working for respondent. Respondent denies claimant was working, based upon a time restriction limiting the time claimant could begin working. Claimant was unable to identify the neighborhood he had just left, unable to recall if he talked to any home owner and disagreed with his wife whether he had worked north or south of their son's electronics store or whether his stepson was with his wife when she picked him up.

Claimant contended he was a route manager, a position Justin Liogghio denied even existed with this respondent. Claimant testified that he began working at noon, again a statement contradicted by Justin and contradicted by a work Memorandum issued by respondent over one month before the accident. In this instance, claimant's request for benefits depends substantially on his own testimony. The ALJ noted claimant's lack of

credibility. The ALJ denied claimant's request for benefits based upon a lack of credibility. This Board Member agrees with that determination.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[1] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to prove that he suffered personal injury by accident which arose out of and in the course of his employment with respondent.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated July 12, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
shockerjd@jlopa.com
cbrewer@jlopa.com

Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
timothy.emerson@thehartford.com
denise.allen@thehartford.com

Bruce E. Moore, Administrative Law Judge

[1] K.S.A. 2012 Supp. 44-534a.